



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Investigation on Motion of the
Department of Natural Resources of an Alleged
Unlawful Placement of Fill in a Wetland/Lakebed
Creating a Solid Structure on the Bed of Anderson
Lake, Town of Breed, Oconto County, Wisconsin,
by Jim Eichinger

Case No.: 3-NE-00-066

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Department of Natural Resources' Northeast Region staff conducted field investigations and allege that Mr. Jim Eichinger, 111 Daniel Street, Combined Locks, Wisconsin, placed fill in a wetland and on lakebed and in doing so created and is maintaining a solid structure on the bed of Anderson Lake, in Section 4, Township 30 North, Range 17 East, Town of Breed, Oconto County, Wisconsin, in violation of Wis. Stat. §§ 30.12 and 30.15 and Wis. Admin. Code ch. NR 103. It is further alleged that this structure, in its current size and configuration, interferes with the rights and interests of the public on Anderson Lake.

It is alleged that the maintenance of said structure and the use associated with it on Anderson Lake in violation of Wis. Stat. §§ 30.12 and 30.15 and Wis. Admin. Code ch. NR 103, is declared to be a public nuisance pursuant to Wis. Stat. § 30.294.

It is alleged, therefore, that said actions by the above-named respondent constitute a violation of Wis. Stat. §§ 30.12 and 30.15 and Wis. Admin. Code ch. NR 103.

Pursuant to due notice hearing was held on November 1, 2000, at Oconto, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ), presiding.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Attorney Michael D. Scott
P. O. Box 7921
Madison, WI 53707-7921

James F. Eichinger
111 Daniel Court
Combined Locks, WI 54113

FINDINGS OF FACT

1. Mr. James Eichinger owns real property located in Section 4, Township 30 North, Range 17 East, Town of Breed, Oconto County, Wisconsin.
2. Anderson Lake (the lake) is a navigable water of the state, constituting approximately 180 surface water acres. The lake is a popular recreational destination for boating and fishing.
3. The eastern shore of the lake is bordered by a state highway. The lake is quite developed, although the southwest bottom of the lake is characterized by wetlands and less development.
4. In May, 1985, Mr. Eichinger applied for a joint state/federal permit to place fill and create a foot trail of sand one foot deep, 700 feet long and seven feet wide. In June of 1985, the U.S. Army Corps of Engineers (USCOE) published public notice of the application.
5. On July 25, 1985, the DNR, by Neal Kutchery inspected the site and determined that some 450 feet of the proposed fill was in a wetland area below the ordinary high-water mark (OHWM) of Anderson Lake. Because Wisconsin law does not permit the filling of public lakebed, the DNR objected to the proposed fill permit. (Ex. 26)
6. On August 1, 1985, then DNR Water Management Coordinator formally objected to the Eichinger permit request to the USCOE. (Id.)
7. After negotiation, the USCOE issued a fill permit to Eichinger. This permit reduced the area of the proposed fill to an area 250 feet long and seven feet wide. (Ex. 10)
8. At hearing, Mr. Eichinger claimed that he did not read the USCOE permit, and that he was not aware that nearly two-thirds of the fill area was not approved. However, Mr. Eichinger was responsible for filling only such area as was approved by USCOE. Further, a USCOE cover letter accompanying the permit specifically warned Eichinger that "the attached permit authorizes the placement of less fill than originally applied for." (Ex. 28)
9. On August 23, 1995, the local DNR Warden, Robert Goerlinger, while doing unrelated water level work, discovered the extent of the fill, which included fresh earthen fill on the floating bog area. On November 30, 1995, the DNR sent Eichinger notice that he was in violation of the terms of his fill permit. (Ex. 22)
10. On April 17, 1996, Eichinger sent a letter to the DNR admitting that he had placed fill, but claiming that such placement was in accordance with the USCOE permit and DNR practice.

11. Mr. Eichinger filled an area well beyond the terms of the USCOE permit. DNR Warden Goerlinger stated that an area 546 feet long was filled below the OHWM. DNR Water Management Specialist, Robert Rosenberger, provided undisputed expert testimony as to the location of a distinct mark and change of vegetation indicating the location of the ordinary highwater mark. (OHWM.) (See Ex. 11; NR 320.03(4)) In particular, there is an abrupt change of vegetation from a forested area of ash trees and tag elder, to more scrubby, marsh-like vegetation characterized by cattails, leatherleaf, and other wetland plants. (Rosenberger) Rosenberger opined that this line represented the OHWM, and that below that mark "you are walking on public lakebed." Accompanied by Eichinger, Rosenberger measured the length of the fill below the OHWM as 546 feet long and 6 feet wide (Ex. 39). This is in addition to 276 feet of wetland fill placed above the OHWM. (Ex. 3)

12. Eichinger has violated the terms of his USCOE permits, and has filled a substantial area below the OHWM, which is held in the public trust. (Goerlinger, Rosenberger) Rosenberger opined that there was no significant change in the OHWM since the USCOE permit was issued in 1985. Eichinger either knew or should have known that he was placing fill in a substantial area of public lakebed not authorized by the 1985 USCOE permit.

13. Imposition of a fine would not be sufficient to protect the public interest in navigable waters of the state. (Rosenberger) Rosenberger opined that the Department was concerned about the prospect of many small fills in public lakebed, and that these individual fills could cumulatively be significant to the public interest in protecting public waters. Further, there are alternatives available to allow Eichinger access to the water, including the placement of a pier or boardwalk on pilings. Finally, Rosenberger opined that removal of the fill would not be likely to cause any significant damage to water quality or other public interest values in Anderson Lake. If the area is restored, it will again be available for flood-water storage, and fish and wildlife habitat. (Rosenberger) Under all of these circumstances, only removal of the fill below the OHWM will be protective of the public interest.

14. The area of fill below the OHWM, consisting of approximately 546 feet, must be removed by Mr. Eichinger as soon as practically possible and in no case later than ninety (90) days from the effective date of the Order set forth below. Best erosion control measures shall be employed during removal of the unlawful fill, including the placement of silt fence as appropriate. Eichinger shall submit plans acceptable to the DNR prior to placement of any pier, boardwalk or pilings as an alternative means of lake access.

DISCUSSION

There is no question that an area far beyond the 250 feet authorized by the USCOE was filled in 1985. Whether Mr. Eichinger understood or even read the terms of the permit is not the issue. He had an obligation to comply with the terms of the permit. The Department has been exceedingly patient in giving Mr. Eichinger time to remove the fill. On November 21, 1996, a citation was issued to Eichinger seeking a forfeiture and restoration of the site by July 15, 1997. Eichinger apparently agreed, but did not restore the site. (Ex. 7) It is time that the public lakebed be returned to the public trust. It should be noted that the 1985 permit was issued before the

current state wetland regulatory scheme was put in place. Accordingly, the Order to remove fill is limited to areas below the OHWM. Given that there are alternatives available, it is unlikely that even the wetland fill above the OHWM would be approved under the existing regulatory scheme.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases relating to allegations of illegal placement of fills pursuant to Wis. Stat. §§ 30.03 and 227.43.

2. The State of Wisconsin holds in public trust the title to the beds of all lakes up to the line of the OHWM. Such lands below the OHWM need not be navigable in fact to constitute lake bed held in trust for the public. *State v. Trudeau*, 139 Wis. 2d 92, 106, 408 N.W.2d 337 (1987).

A substantial portion of the area filled by Mr. Eichinger was below the OHWM, and thus unlawfully filled lakebed.

3. No Wis. Stat. § 30.12 permit was ever issued to fill areas of lakebed, nor would it have been appropriate to do so.

4. The DNR must consider the cumulative impacts of approving individual projects under Wis. Stat. § ch. 30, *Hixon v. PSC*, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966). Accord: *Sterlingworth Condo v. DNR*, 205 Wis. 2d 710, 722, 556 N.W.2d 792 (Wis. Ct. App. 1996).

5. The area of fill violates the terms of the 1985 USCOE permit, and is “a violation of the statutes relating to navigable waters” within the meaning of Wis. Stat. § 30.03(4). Imposition of a fine would not be sufficient to protect the public interest in preserving public lakebed.

6. Placement of the fill to create an access road is not a wetland dependent activity within the meaning of Wis. Admin. Code §§ NR 103.07(2) and NR 103.08(4)(a)(1), because construction of the access road is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

7. There are currently “practicable alternatives” “available and capable of being implemented” to the reduced fill area and access road, “after taking into consideration cost, available technology and logistics in light of overall project purposes” within the meaning of Wis. Admin. Code § NR 103.07(2). This includes but is not limited to placement of a pier or boardwalk on pilings to allow for access to the lake.

8. The existing fill results in violation of the standards contained in Wis. Admin. Code § NR 103.08(3) in that practicable alternatives to the proposed project which will not adversely affect wetlands exist and the project results in significant adverse impact to the

functional values of the affected wetlands, significant adverse impacts to water quality and other significant adverse environmental consequences.

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that within ninety (90) days the access roadway fill shall be removed in the area below the OHWM, consisting of approximately 546 feet, and the area shall be, to the extent possible, restored to its condition prior to the placement of the fill. Erosion control measures shall be employed during removal, and any alternative method of access, including but not limited to the placement of pilings for a boardwalk or pier, shall be undertaken only after plans for the same are approved by the DNR.

Dated at Madison, Wisconsin on December 1, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.